76-1334

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1976

Misc. No. _____

HENRY COWAN, SUPERINTENDENT
KENTUCKY STATE PENITENTIARY ... PETITIONER

V.

PAUL LEWIS HAYES ..... RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioner, Henry Cowan, respectfully prays that a writ of certiorari issue to review the judgment and order of the United States Court of Appeals for the Sixth Circuit decided December 30, 1976.

OPINION BELOW

The judgment and order of the United States Court of Appeals for the Sixth Circuit in this case is reported as *Hayes* v. *Cowan* 547 F.2d 42 (6th Cir. 1976). The opinion and order are set out in full in the Appendix, 1a-8a.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was decided and filed on December 30, 1976. This petition for a writ of certiorari was filed within ninety (90) days of that date. Jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

WHETHER THE COMMONWEALTH'S ATTORNEY IS PROHIBITED FROM BARGAINING FOR A PLEA OF GUILTY BY THREATENING TO BRING AN ADDITIONAL INDICTMENT IF AN ACCUSED DOES NOT ACCEPT A PLEA BARGAIN OFFER.

CONSTITUTIONAL PROVISIONS INVOLVED

The provisions of the United States Constitution involved are the Fifth, Sixth and Fourteenth Amendments.

STATEMENT OF THE FACTS AND OF THE CASE

The facts which led to Paul Lewis Hayes' conviction and incarceration are not disputed. Hayes, respondent herein, was indicted by the Fayette County Grand Jury, Lexington, Kentucky, on January 8, 1973, for the charge of uttering a forged instrument under Kentucky Revised Statute (KRS) 434.130. After arraignment, pretrial conferences were held with the Commonwealth's attorney on January 24 and 26, 1973. During these conferences the prosecutor offered to recommend a five-year sentence if Hayes would plead guilty to uttering a forged instrument. Conviction for uttering a forged instrument

carried a penalty of from two to ten years in prison. Hayes was told that if he did not plead guilty, he would be charged under the then Kentucky Habitual Criminal Act, KRS 431.190. Hayes chose not to plead guilty in the face of a strong case against him.

The prosecutor thereupon returned to the grand jury on January 29, 1973, and obtained an indictment charging Hayes under the Habitual Criminal Act.

A bifurcated trial was held in the Fayette Circuit Court, Lexington, Fayette County, Kentucky, on April 19-20, 1973, and a conviction was returned on both the principal charge and as an habitual criminal. As required by the habitual criminal statute where conviction is had on the principal charge and of having twice before been convicted of felonies, Hayes was sentenced to life in the penitentiary.

At the beginning of the second phase of the trial for consideration under the habitual criminal indictment, Hayes on his own objected to the manner in which he had been indicted on the habitual criminal charge. The facts concerning this matter were admitted by the prosecutor during his cross-examination of Hayes at the trial. The prosecutor said:

> "[I]sn't it a fact that I told you if you did not intend to save the court the inconvenience and necessity of a trial and taking up this time that I intended to return to the grand jury and ask them to indict you based upon these prior felony convictions?"

See Appendix, 3b. Hayes' refusal to plead guilty clearly

lead to his indictment under the habitual criminal statute.

The issue involved in this petition for certiorari of whether the Commonwealth's attorney, as the representative of the state, is prohibited from bargaining for a plea of guilty by threatening to bring an additional indictment if an accused does not accept a plea bargain offer, was raised on direct appeal by Hayes to the Kentucky Court of Appeals, the then highest appellate court in the Commonwealth. Hayes argued that his Fifth, Sixth and Fourteenth Amendment rights were abridged by the prosecutor's action in bringing the habitual criminal charge. The Kentucky Court of Appeals affirmed Hayes' conviction on March 1, 1974, in an unreported memorandum opinion saying Hayes had risked the maximum sentence of life imprisonment for a sentence of five years and that he "cannot now complain of his bad bargain." See Appendix, 4c.

A Petition for a Writ of Habeas Corpus was filed on June 11, 1975, in the United States District Court for the Eastern District of Kentucky. A Magistrate's Report and Recommendation was also filed on June 11, 1975, wherein the opinion was that the petition was "patently without merit." See Appendix, 2d.

On September 9, 1975, Judge Bernard T. Moynahan, Jr., entered an order adopting the Magistrate's Report and Recommendation and thereby denied the Petition for Writ of Habeas Corpus. See Appendix, 1e.

After an Application for Certificate of Probable Cause was filed in the United States District Court on

October 9, 1975, Judge Moynahan entered an order on December 19, 1975, declining to issue a Certificate of Probable Cause and specifically finding that the appeal sought was frivolous, not taken in good faith, and not presenting a substantial question. See Appendix, 3f.

An appeal was taken to the Sixth Circuit Court of Appeals. In an opinion rendered December 30, 1976, the Sixth Circuit held that the Commonwealth had violated Hayes' due process rights by placing him in fear of retaliatory action for insisting on his constitutional rights to stand trial before a jury. It is from this order of the United States Court of Appeals for the Sixth Circuit that a review is sought.

REASONS FOR GRANTING THE WRIT

The Sixth Circuit has decided an important constitutional question presented by this case which has not been but should be decided by this Court.

The Sixth Circuit's decision severely erodes the role of plea bargaining in the administration of criminal justice. The Sixth Circuit's decision has instructed how prosecutors may constitutionally use their plea bargaining leverage. The position of the Sixth Circuit is that a prosecutor may not seek an additional indictment, specifically under an enhancement statute, if an accused chooses to stand trial rather than plead guilty to an offer made by the prosecutor on the original charge. This Court should note that this decision has no parallel by any other federal court and that it is in direct conflict with the opinion of the United States District Judge involved with

this case as well as being in direct conflict with the decision of the Kentucky Court of Appeals.

The petitioner submits that the prosecutor's action found to be constitutionally impermissible by the Sixth Circuit Court of Appeals is no more vindictive than is any other aspect of the plea bargaining process and that the leverage which may be applied by a prosecutor in question in this case does not impose any unconstitutional penalty for the assertion of rights by one accused of a felony.

The state to some degree acts in a coercive and vindictive manner at every important step in the criminal process. Apprehending and charging an individual are both threatening acts by the state. *Brady* v. *United States*, 397 U.S. 742, 757 (1970). Plea bargaining which usually follows being charged with crime is threatening, too. By its very nature plea bargaining serves to grant certain concessions to an accused in the event a guilty plea is entered. A prosecutor may agree to recommend a particular sentence, to drop counts, to permit a plea to a lesser included offense, or to drop an enhancement provision in the indictment. Plea bargaining is a vehicle of the prosepective branch of the criminal justice system and it is the prosecutor, not the accused, who is in control. The risks involved in plea bargaining rests, however, exclusively upon the accused. If the bargain offered by a prosecutor is not accepted, an accused must face the risks of a harsher penalty upon conviction. Definitely the plea bargaining process discourages assertion of the Fifth Amendment right not to plead guilty, and to

deter exercise of the Sixth Amendment right to demand a jury trial. Having to decide whether to compromise these valuable constitutional rights has a considerable coercive impact.

Nevertheless, this Court has unequivocally given its approval to the process of plea bargaining. In *Brady*, supra, at 752, this Court stated that plea bargaining helps conserve judicial and prosecutorial resources in cases in which there is no substantial issue as to the defendant's guilt. The Sixth Circuit Court of Appeals recognized on the present case that this Court has indicated that there are limits to the tactics that a prosecutor may use in bargaining with defendants and cites *Santobello* v. *New York*, 404 U.S. 257 (1971). The Sixth Circuit stated it was clear "that the legitimate purposes of plea bargaining are not served if a prosecutor abuses his powers in order to coerce an unwilling defendant into foregoing his constitutional right to trial." Appendix, 4a.

The Sixth Circuit opinion is based substantially upon holdings by this Court that defendants who assert procedural rights must be treated in a way that avoids any suggestion of vindictive or retaliatory motive. In *North Carolina* v. *Pearce*, 395 U.S. 711 (1969), this Court considered the constitutional problems presented wherein after a successful appeal and reconviction, the defendant was sentenced to a greater punishment than he had received at the first trial.

In *Blackledge* v. *Perry*, 417 U.S. 21, 28 (1974), this Court held that when the circumstances pose a realistic

likelihood of vindictiveness, due process requires a rule analogous to that of the *Pearce* case.

The Sixth Circuit's reliance on these cases relative to the procedure in question in the present case was misplaced. This Court's holding in *Pearce* and *Blackledge* and their lower court progeny all relate to situations dealing with *other than plea bargaining*. These cases involve retaliatory actions by the court or the prosecution after an attempt to exercise procedure rights has been made by the defendant. In *Pearce*, the accused successfully challenged his first conviction on appeal. In *Blackledge*, the accused sought a trial *de novo*. In *United States* v. *Jamison*, 505 F.2d 407 (D.C. Cir. 1974), the accused had been granted a mistrial. In *United States* v. *DeMarco*, 401 F. Supp. 505 (C.D. Cal. 1975), the accused had asserted his right to change of venue. In *United States* v. *Ruesga-Martinez*, 534 F. 2d 1367 (9th Cir. 1976), the accused had refused to sign a form waiving his right to be tried by a district judge. None of these cases involved the plea bargaining process as existed in the present case. Yet their holdings are cited in support of the Sixth Circuit's decision striking down the plea bargaining procedure used by the Commonwealth's prosecutor in this case. Petitioner submits that the Sixth Circuit's decision in this case illogically applied the salutary *Pearce* principle, even as extended to prosecutorial conduct in *Blackledge*, to a situation far removed from the problem for which the principle was designed.

The question in this case should be whether the effects of the procedure used by the prosecutor impose an impermissible burden upon the exercise of any right of

the accused. The prosecutor did not threaten physical harm, nor threaten prosecution on a charge not justified by the evidence, either of which would be impermissible. See *Brady*, supra, at 757 and 758 f.n. 8. What the prosecutor did in the present case was to create natural coercive impact upon the accused through the plea bargaining process with a promise of leniency for a plea of guilty. At that point Hayes was faced with the Hobson's choice of compromising valuable constitutional rights out of the fear of greater punishment. The prosecutor offered Hayes five years on a charge that carried a possible ten years in the penitentiary. The prosecutor had foregone obtaining the habitual criminal charge against Hayes but made it clear to him that he could go back to the grand jury and have him indicted under the habitual criminal statute because of his two prior existing felony convictions. Hayes' gamble in this process was simply that he could escape conviction on the charge of uttering a forged instrument. When he chose not to plead guilty, the prosecutor upped the ante to pot limit by obtaining the habitual criminal indictment.

The end result of the procedure used by the prosecutor in this case was no more vindictive so as to impose an impermissible burden upon the assertion of any right than is the frequent situation where a prosecutor indicts on a principal charge and also under the habitual criminal statute and then bargains for a plea of guilty to the principal charge on the promise the prosecutor will make a motion to drop the habitual criminal charge. The difference between the leverage and coercive impact involved in the present case and that in the procedure noted

above is nonexistent. The constitutional rights to be compromised are the same and the stakes for going to trial are the same. The prosecutor is in both situations exercising the same range of options available for leverage to obtain a guilty plea so as to avoid going to trial. On the one hand, the prosecutor, who has the discretion whether to indict on the habitual criminal charge, seeks an indictment on a principal charge plus the habitual criminal charge and then seeks a plea of guilty and in return will drop the habitual criminal charge. On the other hand, the prosecutor indicts on a principal charge and attempts to obtain a guilty plea, holding in reserve the possibility of returning to the grand jury for indictment under the habitual criminal statute if no guilty plea is obtained. The Sixth Circuit's decision finds in this case that one way of arriving at the same stakes is vindictively motivated while the other way of arriving at the same point is an accepted practice in the useful process of plea bargaining. The burden upon Hayes during the plea bargaining procedure used in this case should be found to be not unconstitutionally impermissible.

We believe further that it is inescapably necessary to consider this case from the perspective of what the very definite controlling law would be on the situation if Hayes would have chosen to plead guilty and have taken the five years on the uttering charge rather than having risked facing the habitual criminal charge and the possibility upon conviction of receiving life imprisonment. Clearly such a possibility as this, which could have resulted from the very practice proscribed by the Sixth Circuit, would be found to be constitutionally permissible. A plea of

guilty motivated by a desire to avoid harsher punishment has been found to be not involuntary if it is a well-considered, prudent choice of the lesser of two evils. *Brady*, supra, and its companion cases, *McMann* v. *Richardson*, 397 U.S. 759 (1970), and *Parker* v. *North Carolina*, 397 U.S. 790 (1970). The Kentucky Court of Appeals, citing the *Brady* case, has stated that mental pressure placed on a defendant, charged with serious crime, in being forced to choose between accepting conviction of a less serious offense, upon a plea of guilty, or instead, standing trial under the habitual criminal statute was not such that the defendant was disabled from constitutionally waiving his right to trial by jury. *Padgett* v. *Commonwealth*, Ky., 493 S.W.2d 710 (1973).

For the foregoing reasons, if the decision of the Sixth Circuit in the present case is allowed to stand, the role of plea bargaining as an effective tool in the administration of criminal justice will have been significantly diminished.

CONCLUSION

Petitioner submits that it is necessary for this Court to review the decision of the Sixth Circuit which gave a chilling construction to plea bargaining and took away an important part of the prosecutor's bargaining leverage.

Respectfully submitted,

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PROOF OF SERVICE

I, Robert L. Chenoweth, one of counsel for the petitioner, hereby certify that three (3) copies of the foregoing brief were mailed, postage prepaid, to Honorable J. Vincent Aprile, II, Assistant Deputy Public Defender, 625 Leawood Drive, Frankfort, Kentucky 40601, this March 25, 1977.

Robert L. Chenoweth

Robert L. Chenoweth
Assistant Attorney General
Commonwealth of Kentucky

APPENDIX

No. 76-1409

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

PAUL LEWIS HAYES,
Petitioner-Appellant,

v.

HENRY COWAN, Warden,
Respondent-Appellee.

APPEAL from the United States District Court for the Eastern District of Kentucky.

Decided and Filed December 30, 1976.

Before: PECK, McCREE, and LIVELY, Circuit Judges.

McCREE, Circuit Judge. This is an appeal from the denial of a petition for habeas corpus challenging confinement based on Hayes' conviction of being an habitual criminal under Kentucky's recidivist statute, K.R.S. §431.190.[1] The district court referred the petition to a magi-

[1]At the time of appellant's conviction the statute provided:

> Conviction of felony; punishment on second and third offenses. Any person convicted a second time of felony shall be confined in the penitentiary not less than double the time of the sentence under the first conviction; if convicted a third time of felony, he shall be confined in the penitentiary during his life. Judgment in such cases shall not be given for the increased penalty unless the jury finds, from the record and other competent evidence, the fact of former convictions for felony committed by the prisoner, in or out of this state.

It has since been repealed. According to §532.080, which now

strate to determine whether leave to proceed *in forma pauperis* should be granted pursuant to 28 U.S.C. §1915 (a). Although the magistrate ordered the petition filed and determined that petitioner's claims were not so frivolous that *in forma pauperis* leave should not be granted, nevertheless, he concluded that the contentions made were "patently without merit" and recommended that the petition be dismissed. The district court adopted the magistrate's conclusions and, instead of issuing an order to the respondent to show cause as provided in 28 U.S.C. §2243, it dismissed the petition on the grounds that the mandatory life sentence imposed for the habitual criminal conviction did not constitute cruel and unusual punishment, that petitioner had not been arbitrarily selected for prosecution as an habitual criminal, and that the state prosecutor's decision to seek an habitual criminal indictment when petitioner refused to plead guilty to the charge of forgery in return for a recommendation of a five-year sentence was not an unconstitutional implementation of plea bargaining.

We issued a certificate of probable cause to permit an appeal when the district court, determining that an

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regulates "persistent felony offender sentencing," the special sentence may be imposed only if, for each of two previous felony convictions, the sentence was at least one year; defendant was imprisoned under each such sentence before commission of the instant felony; and the offender was over eighteen years of age at the time he committed each offense. Petitioner would not have been subjected to enhanced sentencing under §532.080, because none of hese conditions were satisfied.

appeal would be frivolous and not taken in good faith, declined to do so. Because we conclude that petitioner was denied the due process of law by the prosecutor's tactics, we reverse.

The facts which led to petitioner's conviction and incarceration are not disputed.[2] On January 8, 1973, he was indicted for forgery of a check in the amount of $88.30 by a Fayette County, Kentucky grand jury. After arraignment, a pretrial conference was held with the state prosecutor. During this conference, the prosecutor offered to recommend a five-year sentence if Hayes would plead guilty. Petitioner was warned that if he did not plead guilty, he would be charged under the habitual criminal statute. He refused to plead guilty, but insisted on receiving a full trial. The prosecutor thereupon returned to the grand jury, and, on January 29, 1973, obtained a new indictment charging petitioner under the habitual criminal statute based upon the forgery as a third offense. Petitioner was convicted by a jury, and on the instructions of the judge, the mandatory life sentence for a third offense habitual criminal was imposed.[3]

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[2]These facts were admitted by the prosecutor during his cross-examination of appellant at the sentencing trial:

> . . . isn't it a fact that I told you if you did not intend to save the court the inconvenience and necessity of a trial and taking up this time that I intended to return to the grand jury and ask them to indict you based upon these prior felony convictions?

[3]We expressed our disapproval of such practices in Cunning-

We recognize that plea bargaining now plays an important role in our criminal justice system. In *United States* v. *Brady*, 397 U.S. 742, 752 (1970), the Supreme Court approved the practice, and stated that plea bargaining helps to conserve judicial and prosecutorial resources in cases in which there is no substantial issue about the defendant's guilt. The Court has recognized, however, however, that there are limits to the tactics that a prosecutor may use in bargaining with defendants. See *Santobello* v. *New York*, 404 U.S. 257 (1971). The Court has not yet had an opportunity to explore fully these limits, particularly in cases such as this, "where the prosecutor . . . deliberately employed[ed his] charging . . . powers to induce a particular defendant to tender a plea of guilty." *Brady, supra*, at 751 n.8. But it is clear that the legitimate purposes of plea bargaining are not served if a prosecutor abuses his powers in order to coerce an unwilling defendant into foregoing his constitutional right to trial.

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ham v. Wingo, 443 F.2d 195, 198 n.1 (1971). In that case we noted the findings of the President's Commission of Law Enforcement and Adminstration of Justice in **The Challenge of Crime in a Free Society** (1967):

> "At the same time the negotiated plea of guilty can be subject to serious abuses. In hard-pressed courts, where judges and prosecutors are unable to deal effectively with all cases presented to them, dangerous offenders may be able manipulate the system to obtain unjustifiably lenient treatment. There are also real dangers that excessive rewards will be offered to induce pleas or that prosecutors will threaten to seek a harsh sentence if the defendant does not plead guilty. Such practices place unacceptable burdens not the defendant who legitimately insists upon his right to trial. • • •" (Emphasis supplied.)

The Supreme Court has held that defendants who assert procedural rights must be treated in a way that avoids any suggestion of vindictive or retaliatory motive. In *North Carolina* v. *Pearce*, 395 U.S. 711 (1969), the Court held that a defendant may not be subjected to a more severe penalty on retrial after a successful collateral attack against a conviction. The Court reasoned that due process requires that a defendant be free from fear of retaliatory action when he asserts procedural rights. Therefore a defendant may not be dealt with more harshly on retrial unless the permissible reasons therefor affirmatively appear.

In *Blackledge* v. *Perry*, 417 U.S. 21 (1974), the Court applied the rule expressed in *Pearce* to protect defendants from the vindictive exercise of a prosecutor's discretion. In that case, a defendant in a misdemeanor prosecution had asserted his right to a trial de novo on appeal. Before the new trial, the prosecutor obtained a felony indictment against the defendant. The Court held that this tactic, if allowed would deter defendants from asserting their procedural rights. The Court emphasied that the prosecution should not be allowed to behave in a manner that even suggests a retaliatory motive.

The concerns expressed in *Blackledge* have persuaded several lower courts to limit the prosecutor's discretion in

related situations. In *United States* v. *Jamison*, 505 F.2d 407 (D.C. Cir. 1974), the court reversed a conviction of first degree murder obtained after the defendants had been granted a mistrial during an earlier trial based on an indictment for second degree murder. In *United States* v. *DeMarco*, 401 F. Supp. 505 (C.D. Cal. 1975), the court refused to allow prosecution of an indictment obtained after a defendant had asserted his right to a change of venue of a trial on an indictment charging less serious offenses. In *United States* v. *Ruesga-Martinez*, 534 F. 2d 1367 (9th Cir. 1976), the court held that a defendant cannot be tried on a felony indictment after he has refused to plead guilty to a misdemeanor, if no justification of the increase in severity of the charges is offered. See also *United States* v. *Gerard*, 491 F.2d 1300 (9th Cir. 1974); *United States* v. *Butler*, 515 F. Supp. 394 (D. Conn. 1976); *Sefchek* v. *Brewer*, 301 F. Supp. 793 (D. Iowa 1969).

We hold that a similar potential for impermissible vindictiveness exists when a prosecutor is allowed to bring an habitual offender indictment against a defendant who has refused to plead guilty to an indictment for the same unenhanced substantive offense. In this case the prosecutor does not assert that any event occurred between the issuance of the first indictment and the issuance of the second to influence his decision except petitioner's insistence upon his right to trial. There is no indication that the prosecutor, had he thought such an indictment

proper, could not have included the habitual criminal charges in the original indictment.

The Commonwealth urges that the entire concept of plea bargaining will be destroyed if prosecutors are not allowed to seek convictions on more serious charges if defendants refuse to plead guilty. We do not agree. Although a prosecutor may in the course of plea negotiations offer a defendant concessions relating to prosecution under an existing indictment, see *United States ex rel. William* v. *McMann*, 436 F.2d 103 (2d Cir. 1970), *cert. denied*, 402 U.S. 914 (1971), he may not threaten a defendant with the consequence that more severe charges may be brought if he insists on going to trial. When a prosecutor obtains an indictment less severe than the facts known to him at the time might permit, he makes a discretionary determination that the interests of the state are served by not seeking more serious charges. Cf. *United States* v. *Johnson*, 537 F.2d 1170 (4th Cir. 1976). Accordingly, if after plea negotiations fail, he then procures an indictment charging a more serious crime, a strong inference is created that the only reason for the more serious charges is vindictiveness. Under these circumstances, the prosecutor should be required to justify his action. In this case, a vindictive motive need not be inferred. The prosecutor has admitted it.

Therefore we hold that due process has been offended by placing petitioner in fear of retaliatory action for insisting upon his constitutional right to stand trial. Accordingly, the dismissal of the petition is reversed and

the case is remanded with instructions to order petitioner's discharge except for his confinement under a lawful sentence imposed solely for the crime of uttering a forged instrument.

* * * * * * *

A. No.

X10 All right, what is cop-out court, if that is not right?

A. Cop-out to me is that . . . uh . . . you offered me a five-year plea and you told me if I didn't take five years that you would indict me on the habitual criminal. That is what you done.

X11 All right, was the Judge there?

A. No.

X12 Was the jury there?

A. No.

X13 Was your lawyer there?

A. That's right, yes.

X14 And, I was there?

A. Yes.

X15 And, I made these statements to you all both in the presence of both of you, didn't I?

A. No.

X16 I didn't talk to you privately, did I?

A. No.

X17 Your lawyer, Mr. Wake, was there during the entire time, wasn't he?

A. That's right.

X18 And, then, I left you and Mr. Wake alone to discuss it by yourself -- by yourselves in a room by yourselves?

A. No, no, no.

X19 You and Mr. Wake did not discuss this matter by yourselves in a room and I left and, then, later I came back and asked what you wanted to do?

A. No, you walked out of the room and you threatened me with the habitual criminal, you know, and --

X20 And, then I walked out of the room, didn't I?

A. You walked out of the room.

X21 And, I told you that the law was that there was a habitual criminal act that I had to place against you?

A. No, you did not tell me that; you told me that you was indicting me on the "hibitch" if I didn't take the five-year plea. That is what you told me.

X22 Isn't it a fact that I told you at that time if you did not intend to plead guilty to five years for this charge and that they had caught you inside and that your accomplice had made a statement against you -- isn't it a fact that I told you at that time that if

you did not intend to save the court the inconvenience and necessity of a trial and taking up this time that I intended to return to the grand jury and ask them to indict you based upon these prior felony convictions?

A. No.

X23 I did not tell you that I was going to return to the grand jury?

A. No.

X24 I told you out of my own --

A. You told me that you was going to indict me -- you told me you was going to indict me on the habitual criminal and you called me back over here the following week on a Friday and I . . . answered the indictment on the habitual criminal. That was it. That was all that you told me.

X25 You were arraigned on that charge that the grand jury had brought against you, weren't you?

A. On the "hibitch.."

X26 And, you were asked how you pled to the charge, weren't you?

A. Yes.

X27 And, at that time, you had a lawyer present too, didn't you?

A. Yes.

X28 In fact, you have had a lawyer throughout these proceedings, haven't you?

A. Sure, yeh.

X29 Now, when you first went to the Reformatory in 1962, you were eighteen years old, is that right?

A. Right.

X30 And, at that time, did you learn what the habitual criminal was?

A Yeh, I learned that, yeh.

X31 What is the name that the people have at the penitentiary for the habitual criminal?

A. The "hibitch."

RENDERED: MARCH 1, 1974

COURT OF APPEALS OF KENTUCKY
FILE NO. 73-766

PAUL LEWIS HAYES ..... APPELLANT

V. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES PARK, JR., JUDGE
INDICTMENT NOS. 73-C-26, 73-C-29

COMMONWEALTH OF KENTUCKY ..... APPELLEE

MEMORANDUM OPINION OF THE COURT BY JUSTICE JONES

AFFIRMING
(Not to be cited as authority)

Paul Lewis Hayes was convicted in the Fayette Circuit Court on a two-count indictment, charging him in Count No. 1 with the principal offense of uttering a forged instrument, under KRS 434.130, and in Count No. 2 of having been convicted of two prior felonies, under KRS 431.190. The trial court first tried Hayes on the principal offense of uttering a forgery, and then he was tried under the habitual criminal statute.. The jury found him guilty on both counts and fixed his punishment at confinement in the state penitentiary for life. Upon this appeal, Hayes contends: (1) the trial court erred in failing to direct a verdict in his behalf, he contending that the evidence was insufficient to support the conviction;

(2) the trial court erred in failing to instruct the jury as to the requirement of corroboration of the testimony of an accomplice; (3) he was denied due process and equal protection of the law by the habitual criminal conviction because the mandatory life sentence required by the statute is cruel and unusual punishment.

We have examined the evidence, and we are convinced that it establishes that appellant participated in the crimes with which he is charged. The Commonwealth proved that appellant presented a check to the Pic Pac grocery; that the check presented was stolen from Brown Machine Works; and that the check did not bear an authorized signature. Thus there was an inference that Hayes either had forged the unauthorized signature or knew it to have been forged. It was incumbent on him to satisfactorily explain the uttering or the forgery.

In *Smith* v. *Commonwealth*, Ky., 307 S.W.2d 201, 1957), we stated:

> "When the evidence shows the name attached to the instrument has been forged, the inference arises that the person who uttered it as genuine either forged the instrument or knew it to be forged, and unless the uttering or forgery is explained satisfactorily, the presumption becomes conclusive." *Smith* v. *Commonwealth*, supra, 203.

Appellant's next contention, that the trial court should have given an instruction as to the requirement of corroboration of an accomplice's testimony, is wholly without merit. Appellant failed to object to the instructions in the trial court. The failure constituted a valid

waiver so as to preclude Hayes from securing a reversal of his conviction upon the basis of any alleged error therein. RCr 9.54(2); *Johnson* v. *Commonwealth*, Ky., 477 S.W.2d 159 (1972); *Alsip* v. *Commonwealth*, Ky., 482 S.W.2d 571 (1972).

Hayes next argues that his constitutional rights were abridged by the habitual criminal charge and by his subsequent conviction thereunder. He complains of the leverage available to the Commonwealth's Attorney in deciding whether or not to have an accused indicted under the Habitual Criminal Act, KRS 431.190.

In a pre-trial conference in this case, the Commonwealth's Attorney offered to recommend a five-year sentence if Hayes would plead guilty to the charge of uttering a forgery. This he refused to do although he was advised by the prosecutor that the case would be resubmitted to the grand jury for a new indictment under the Habitual Criminal Act. Based upon our holding in *Cunningham* v. *Commonwealth*, Ky., 447 S.W.2d 81 (1969), we conclude that it was not error for the Commonwealth's Attorney to resubmit the case to the grand jury. We have said:

> "Assuming, however, that the Commonwealth's Attorney was still in a position, in the event Cunningham had then chosen to plead not guilty, to resubmit the cases to the grand jury and ask for new indictments under the Habitual Criminal Act, we are of the opinion nevertheless that this is not the kind of pressure that could be held to affect the voluntariness of a guilty plea. A person charged with a cri-

minal offense always is under the pressure of risking a maximum sentence at the hands of the jury or the court if he does not accede to what the Commonwealth is willing to recommend. The more serious the offense, the greater is the pressure, and it is even more so when the Commonwealth has a strong case. To say that the attorney for the Commonwealth could not use these advantages in discussing the terms and prospects of settlement on the basis of a guilty plea would mean simply that there could be no such settlements. We are unwilling to accept that result." *Cunningham* v. *Commonwealth*, supra 83.

Here Hayes risked the maximum sentence of life imprisonment for a sentence of five years. He cannot now complain of his bad bargain.

Finally Hayes argues that a mandatory life sentence under the Habitual Criminal Act in his case is too severe a penalty, constituting cruel and unusual punishment. In light of the previous felonies of which he had been convicted, viz., detaining a female against her will (a lesser included offense of rape), and robbery, we think the punishment is not too harsh. We have held the Habitual Criminal Act, KRS 431.190, to be constitutional. *Barber* v. *Thomas*, Ky., 355 S.W.2d 682 (1962).

The punishment authorized by the statute was not wrongly or disproportionately applied to the appellant. Accordingly, the judgment is affirmed.

All concur.

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FILED JUNE 11, 1975

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

PAUL LEWIS HAYES ..... **PETITIONER**

VS. **MAGISTRATE'S REPORT AND RECOMMENDATION**
NO. 75-61

HENRY COWAN, Warden, Etc. ..... **RESPONDENT**

• • • • •

The petitioner, alleging that he is incarcerated in the State Penitentiary at Eddyville, has tendered for filing a petition for writ of habeas corpus. He has filed therewith a motion for leave to proceed *in forma pauperis*, which motion is supported by an affidavit of poverty. In accordance with 28 U.S.C. §636(b), and pursuant to a General Order of this Court, the aforesaid documents have been referred to the undersigned Magistrate for preliminary review.

In his tendered pleading the petitioner alleges that his confinement is the result of his convictions, following a bifurcated trial, of the offenses of forgery and of being a habitual criminal. He contends that his conviction as a habitual criminal violates his constitutional rights in that the mandatory sentence of life imprisonment imposed upon such conviction amounts to cruel and unusual punishment in that the selective application of Kentucky's habi-

tual criminal statute causes said life sentence to amount to cruel and unusual punishment; and in that the "vindictive" application of the habitual criminal statute to the petitioner violates his right to due process of law. A copy of an opinion of the Kentucky Court of Appeals attached to the tendered petition demonstrates that the petitioner has presented substantially identical contentions to the Kentucky courts by direct appeal.

In the opinion of the Magistrate, the tendered petition is patently without merit. As held in *Oyler* v. *Boles*, 368 U.S. 448, 451 (1962), "the constitutionality of the practice of inflicting severer criminal penalties upon habitual offenders is no longer open to serious challenge". Moreover, only in the deliberate presence of such factors as race, religion or other arbitrary classification will the courts review the exercise of prosecutorial selection and discretion, even when the exercise of such discretion results in different treatment of co-defendants originally charged with the same offenses in the same case. *Oyler* v. *Boles*, *supra* at page 456; *United States* v. *Bland*, 472 F.2d 1329, 1336 (D.C. Cir. 1972), cert. denied 412 U.S. 909.

There is authority for the proposition that any sentence, including a mandatory sentence of life imprisonupon conviction of being a habitual criminal, may amount to cruel and unusual punishment, if wholly disproportionate to the nature of the underlying offense and unnecessary to the achievement of any legitimate legislative purpose. *Weems* v. *United States*, 217 U.S. 349 (1910); *Hart* v. *Coiner*, 483 F.2d 136, 143 (4th Cir. 1973), cert. denied 415 U.S. 938. However, as noted by the Kentucky

Court of Appeals in the instant case, the convictions underlying the petitioner's habitual criminal conviction were detaining a female (a lesser included offense of the charge of rape), robbery and forgery. As conceded by the petitioner, the subject felonies occurred during a 12 year period beginning when the petitioner was 17 years old. One convicted of violating Kentucky's habitual criminal statute is not thereby rendered ineligible for parole, and, in the opinion of the Magistrate, it cannot be said that it is shocking, disproportionate or unnecessary to a legitimate legislative purpose to require one with a record such as that admitted by the petitioner to serve a substantial period of actual incarceration and to be subject to parole supervision for the rest of his life.

The petitioner's remaining complaints derive from the fact that not all Kentucky defendants having prior felony convictions are prosecuted under the state's habitual criminal statute and that the petitioner was so prosecuted only upon his refusal to plead guilty to the substantive offense of forgery, in return for a five year sentence. It is well settled that there is nothing unconstitutional, *per se*, in the concept of plea bargaining and that a defendant's constitutional rights are not violated by forcing him to choose between a lesser penalty, in return for the entry of a plea of guilty, as opposed to exposing himself to the risk of a greater penalty if he elects to be tried upon a plea of not guilty. *Santobello* v. *New York*, 404 U.S. 257 (1971); *North Carolina* v. *Alford*, 400 U.S. 25 (1970). If prosecutors were precluded from seeking conviction of more serious offenses following rejection by defendants of the opportunity to plead guilty to lesser

offenses, the entire concept of plea bargaining would be effectively destroyed, and, as noted previously herein, in the absence of some claim of invidious discrimination, a defendant's rights are not violated simply because a prosecutor may elect to use the leverage of an applicable habitual criminal statute against him, while not use the same leverage against other defendants.

In summary, it would appear that the petitioner's position was well stated by the Kentucky Court of Appeals in the opinion appended to the tendered petition. As noted by that Court, the petitioner risked the maximum sentence of life imprisonment for a sentence of five years. He cannot now complain of his bad bargain.

The Magistrate will this day enter an Order granting the petitioner leave to proceed *in forma pauperis* and directing that the petition for writ of habeas corpus heretofore tendered by the petitioner be filed herein. However, for those reasons discussed above, it is the Magistrate's recommendation that said petition be denied and that this action be dismissed.

This 11th day of June, 1975.

/s/ David R. Irvin

David R. Irvn, U.S. Magistrate

FILED SEPTEMBER 9, 1975

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

PAUL LEWIS HAYES ..... **PETITIONER**

VS: **ORDER** **CIVIL 75-61**

HENRY COWAN, Warden, Etc. ..... **RESPONDENT**

* * * * *

The Court having considered the entire record herein, including the Magistrate's Report and Recommendation heretofore filed herein on June 11, 1975, and being sufficiently advised;

IT IS NOW THEREFORE ORDERED AND ADJUDGED HEREIN AS FOLLOWS:

(1) That the Magistrate's Report and Recommendation heretofore filed herein be and the same is hereby adopted, confirmed, approved, allowed and established as and for the Court's Findings of Fact and Conclusions of Law herein .

(2) That the petitioner's Petition for Writ of Habeas Corpus be and the same is hereby denied.

(3) That this cause be and the same is hereby dismissed.

This the 9th day of September, 1975.

/s/ Bernard T. Moynahan, Jr.

Bernard T. Moynahan, Jr., Judge

Notice is hereby given of the entry of this order or judgment on September 9, 1975.

Davis T. McGarvey, Clerk
By *Josephine H. Elam*, D.C.

FILED DECEMBER 19, 1975

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

PAUL LEWIS HAYES ..... **PETITIONER**

VS: **ORDER** **CIVIL 75-61**

HENRY COWAN, SUPERINTENDENT
KENTUCKY STATE PENITENTIARY .. **RESPONDENT**

* * * * *

This petition for a Writ of Habeas Corpus is grounded on the claim of petitioner that his conviction as a habitual criminal violates his constitutional rights in that: the mandatory sentence of life imprisonment imposed upon such conviction equates to cruel and unusual punishment; the selective application of Kentucky's habitual criminal statute causes said life sentence to amount to cruel and unusual punishment; and the allegedly "vindictive" application of the habitual criminal statute to the petitioner violates his due process of law.

The claim that the mandatory life imprisonment sentence imposed upon one convicted of the Kentucky habitual criminal statute equates to cruel and unusual punishment is clearly without merit. As was well stated in *Oyler* v. *Boles*, 368 U.S. 448, 451 (1962):

> ". . . the constitutionality of the practice of inflicting severe criminal penalties upon habitual offenders is no longer open to serious challenge".

Moreover, absent some arbitrary classification, the

courts will abjure the review of prosecutorial discretion, albeit the exercise of such discretion may result in different treatment of co-defendants originally charged with identical offenses in the same case. *Oyler* v. *Boles, supra* at page 456.

The Court observes that the convictions undorlying the petitioner's habitual criminal conviction were crimes of a most serious nature and thereby concludes that the sentence received upon conviction of being a habitual criminal was not disproportionate to the nature of the underlying offenses, and that the mandatory sentence imposed was necessary to the achievement of a legitimate legislative purpose.

Petitioner's remaining claims emanate from the fact that not all Kentucky defendants having the requisite number of prior felony convictions are prosecuted under the state's habitual criminal statute and that petitioner was so prosecuted only upon his refusal to plead guilty to the substantive offense of forgery in return for a five (5) year sentence.

It being well established that the concept of plea bargaining, *par se*, is not unconstitutional. *Santobollo* v. *New York*, 404 U.S. 257 (1970). It is apparent from a review of the record in that no oncroachment was made upon petitioner's constitutional rights, that the petitioner chose to risk the maximum sentence of life imprisonment under the Kentucky habitual criminal statute by electing *to* proceed to trial, rather than accepting a sentence of five (5) years in return for a plea of guilty to the forgery charge then lodged against him.

The petitioner, therefore, has no cause for complaint merely because his "choice" resulted in a substantially groater sentence than would have otherwise been imposed had no accepted to proffered "bargain".

The Court specifically finds that the appeal sought herein is frivolous, is not taken in good faith, and does not present a substantial question, and same is therefore denied and the Court declines to issue a Certificate of Probable Cause herein.

This the 19th day of December, 1975.

/s/ Bernard T. Moynahan, Jr.

Bernard T. Moynahan, Jr., Judge

A True Copy Attest:
Davis T. McGarvey, Clerk
U.S. District Court

By *Josephine H. Elam*, D.C.